

MEMORANDUM

EXHIBIT 2

DATE: February 21, 2007

TO: Chairman Jim Taylor; Public Defender Commission Members; Chief Public Defender Randy Hood; and Chief Financial Officer Harry Freeborn

RE: National Summit on Indigent Defense presented by the ABA Standing Committee on Legal Aide and Indigent Defense, Miami, Florida, February, 2007

I attended the above-referenced summit on February 9, 2007. In general, I found the summit to be more informational than last year's. I was disappointed with last year's summit because there seemed to be a lot of complaining about the current condition of the indigent defense delivery system throughout the country, but not many proposals for positive change. This year, I heard more positive presentations and obtained more valuable information.

I have forwarded letters to Norman Leftstein, the man behind the annual summit and to Jim Neuhard, the Chief Appellate Defender for Michigan. I will attach copies of those letters to a separate 3-mail for your review.

When I left Montana I had certain objectives. I will address those as follows:

1. Computer Software. At our latest meeting there was a discussion as to whether JustWare has the capabilities to meet our needs with respect to both case tracking and fiscal management. I asked representatives from various state commissions and programs. All but one are in the same position as we are. They do not have the ability to track, in a single program, both case statistics and the fiscal data associated with those cases. Georgia appears to be the one exception. Emmet Bondurant, Chairman of the Georgia Public Defenders Standards Counsel, advised that the system they currently use, JCAT, does both. He does not pretend to be an IT expert, but would put our IT people in contact with his IT people if we wanted to pursue this. Mr. Bondurant can be reached care of Bondurant, Mixson & Elmore, LLP 1201 West Peachtree Street Northwest, Atlanta, Georgia 30309, phone: (406) 881-4100; fax: (404) 881-4111; email Bondurant@bmelaw.com.
2. Caseload Standards. In spite of the fact that this was a featured item on the agenda, the information that I received was disappointing. Everyone agreed that the ethics opinion issued by the American Bar Association on May 13, 2006 was a positive step toward establishing meaningful caseload standards. Everyone also agreed that the current numbers on annual caseloads were initially raised informally by the American Bar Association in the early 1970's. They really have no basis in reality.

In short, the ethics opinion simply states that, "If work load prevents the lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must withdraw from representation if she cannot provide competent and diligent representation."

Several states have adopted caseload caps without any significant investigation into whether these caps have any basis in reality. The only state that seems to have thoroughly studied the issue is Michigan. Michigan has a formalized cap system based upon the nature of the cases and the extent to which the proceedings are carried. In other words, a homicide is weighed more heavily than a misdemeanor assault. The system also provides a higher rating to a case if it proceeds to trial or is an appeal that results from a lengthy trial as apposed to a sentencing appeal. Jim Neuhard, the Michigan State Appellate Defender, was good enough to give me some of his time. He explained that they have been engaged in this process now for thirty years. He does not believe that the data they have would translate to Montana, but he believes firmly that the methodology used in Michigan would. He actually consulted economics professors at state universities and created the most quantitative system that exists in the United States. I have sent a letter to Mr. Neuhard thanking him for his time and asking him to forward to me any information he might have regarding his methodology and analysis. I will share that information with the commission when I have received it. Parenthetically, Mr. Neuhard indicated that he would be more than happy to come and speak to our commission. I am attaching a scanned copy of three pages of information that Mr. Neuhard provided at the summit. While that information pertains only to appellate work, he assures me that there are similar tables and a similar weighing system regarding trial-level caseloads.

This issue looms large because in *Miranda v. Clark County*, the Ninth Circuit Court of Appeals held that the head of a Public Defender Office is subject to civil liability under §1983 for policies that lead to a denial of an individuals right to effective representation. While I do not believe that we will be able to come up with a standard that will endure the test of time, it is important that we establish a standard as soon as possible that is subject to modification as our experience increases.

There was a general discussion at the meeting regarding various ways to reach annual caseload restrictions. But, disappointingly, there was really no hard data or analysis presented. Jim Newman was a breath of fresh air. He has clearly been the driving force behind Michigan's standards and considers them to be a continuing work-in-progress. I will be very interested in reading the materials that he has volunteered to send.

As an aside, the Current head of the newly-formed North Dakota Public Defender Office did suggest that we, as they apparently have, ask the state bar to adopt the recent ABA opinion on case loads.

3. Incentive Payment for Contract Public Defenders. I asked a number of participants during the breaks and meals about whether anyone was offering incentive pay in addition to some hourly rate for contract Public Defenders. I received no affirmative responses. During a question-and-answer period I asked whether any of the states that they represented had initiated anything along those lines. None had done so. No one, however, was able to project that there would be a downside to doing so. Larry and I will continue to work on some proposed formula for granting incentive reimbursement to contract lawyers who are able to certify that they have support staff, Internet research capability, have met the PDC standards for legal education and for any other factor which would increase a lawyer's proficiency or expertise in representing indigent clients. (North Dakota is currently paying \$65.00 flat rate).

In addition to the foregoing, Robin Huseby, the head of the North Dakota system advised that they ran into trouble with enforcing their standards because they had not adopted them per the Administrative Procedures Act. She didn't expand on this.

Let me know what you think.

Michael J. Sherwood

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February 21, 2007

Jim Neuhard
Chief Appellate Defender
State Appellate Defender Office
645 Griswold Street
Detroit, Michigan 48226-4281

Dear Jim:

Thank you for taking the time to speak with me at the National Summit on Indigent Defense. As I explained, the Montana Public Defender Commission is currently in the process of attempting to establish real-time caseload limitations. My initial research on the Internet and the information that I received at the conference confirmed that you and the Michigan State Appellate Defender Office personnel have invested more time and effort into this issue than anyone else in the United States. While I realize that your data may be stale or inapplicable to Montana, your methodology for developing and analyzing that data would be extremely valuable to the Montana Public Defender Commission.

To the extent that you deem any information which you currently have on file to be relevant to our current task, I would appreciate it if you could forward it to me. That could be done through conventional mail, or, if you wish, the data could be transmitted electronically to me care of mike@mjsherwoodlaw.com.

In light of the fact that Montana's Public Defender system is not quite two years old, Montana's participation in the annual Summit on Indigent Defense is a new development. The presentations at the summit and the associated materials have aided our work immensely.

On behalf of the Commission and myself, thank you for your past and continued dedication to providing quality indigent defense to the citizens of this

Sincerely yours,

MICHAEL J. SHERWOOD

MJS/kej

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February 21, 2007

Norman Lefstein
Professor of Law and Dean Emeritus
Indiana University School of Law
530 West New York Street
Lawrence W. Inlos Hall
Indianapolis, Indiana 46204

Dear Professor Lefstein:

First, I wanted to complement you on the fine program at this year's National Summit on Indigent Defense. As you know, Montana has only recently established a statewide Public Defender System. Your program, as well as all of the materials that have been compiled and made available by the Indiana Public Defender Commission have been invaluable to us in our efforts to establish our new system.

Second, I had a very enlightening conversation with Jim Neuhard from the Michigan State Appellate Defender Office. Jim has graciously agreed to share with me his methodology in reaching Michigan's current caseload standards.

Third, as you probably know, we are currently involved in our first budget fight. The outcome of that fight will determine, to no small extent, the degree of our success in establishing a Public Defender system. Accordingly, it would probably have been premature for me to suggest that Montana would have much to contribute to the Summit on Indigent Defense this year. By the time the summit is held next year, we will have set up a system, designed standards, obtained funding on some level, and dealt with a whole range of details including software selection and modification, personnel matters, hourly rates for contract attorneys, conflict issues and will have at least addressed the issue of establishing real-time caseload limits. To the extent that you feel that sharing our experience, both the successes and the failures, with the attendees at next year's

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summit, the Montana Public Defender Commission would be pleased to do so. If you have any interest, feel free to contact me by phone, mail or e-mail. My email address is mike@mjsherwoodlaw.com.

Again, thank you and all of the members of the Standing Committee on Legal Aide and Indigent Defense for the invaluable information and assistance that you have provided to date.

Sincerely yours,

MICHAEL J. SHERWOOD

MJS/kej□

MEMORANDUM

DATE: February 22, 2007

TO: Chairman Jim Taylor; Public Defender Commission Members; Chief Public Defender Randy Hood; and Chief Financial Officer Harry Freeborn

FROM: Michael J. Sherwood

RE: Mental Health Conference and National Summit on Indigent Defense (2007), Miami, Florida

At the request of the Honorable John Larson, Missoula County District Court Judge, I attended a presentation by the Honorable Steve Liefman, Dade County, Florida, Judge regarding mental health issues as they pertain to criminal defendants. The information provided was shocking and compelling. Judge Liefman has taken the issue of criminal prosecution of the mentally ill to heart. He has made it his personal crusade. He is a very well reasoned, hard working, and compassionate man.

As of now, Dade County does not have a Mental Health Court, *per se*. Judge Liefman was, however, instrumental in setting up a diversion program for misdemeanor cases. His goal is to ultimately establish a program for all criminal defendants, not only in Dade County but throughout the state of Florida.

In summary, his pre-trial misdemeanor diversion program has been highly successful. He has found that prior to the initiation of the program the recidivism rate for people who were identified as mentally ill exceeded 70 percent. He was able to track not only that number but also the costs associated with those prosecutions. Judge Liefman, virtually single handedly, was able to obtain a consensus from law enforcement, the bench, prosecutors and defense attorneys that a new approach should be attempted. They all signed a cooperative agreement. Now, anyone who is suspected of having a mental health issue is seen, usually within twenty-four but no more than forty-eight hours after being taken into custody. The evaluator is a clinical psychologist or psychiatrist. If that evaluator determines that the person is seriously mentally ill and, in all likelihood, will be unable to effectively assist in his own defense, the case is diverted from the Criminal Justice System. In short, the case is dismissed.

Once the case is dismissed, the person is encouraged to participate in a completely voluntary mental health assistance program. For the most part, that program is outpatient. It does, however, have some beds available. Not only is the program far more humane, but it has resulted in a significant cost reduction. In spite of the additional costs incurred in hiring someone to conduct the initial evaluations and more mental health personnel to care for the people who have elected to enter the program, the program also absorbs some of the costs associated with providing medication and housing. Nevertheless, the current program has resulted in a savings of approximately 50 percent. It

has, because the recidivism rate has dropped from more than 70 percent to approximately 25 percent. Judge Liefman indicates that he has documentation to support that conclusion. He agreed to forward me additional information and attached a copy of my letter.

I recognize that the Commission is currently involved in an effort to establish and maintain the most rudimentary quality Public Defender System and that the concept of a Mental Health Court may be something we will need to address at a later date. Nevertheless, based upon what Judge Liefman was saying, I believe that we could aid in establishing a system that is not only far more sensitive to the needs of criminal defendants who mentally ill, but has a clear cost savings as well.

I also wanted to take this opportunity to discuss what I saw when I attended Judge Liefman's program. The Dade County Jail is Florida's largest single psychiatric facility. It has approximately one thousand prisoners who are dosed with psycho tropic medications every day. Dade County has the largest incidence of mental illness in the United States. This is due, in part, to Castro's emptying of the mental health institutions in Cuba during the boat lift some twenty-five to thirty years ago. As you probably know, mental illness is often inherited. In addition, due to the climate in Miami, many people who are homeless and mentally ill migrate to Miami.

The facilities for housing the mentally ill in Dade County occupy three floors of a nine-story building. The facilities are, at best, inhumane. We toured the jail. I was provided a DVD which I will ask Jim to allow me to play at one of our meetings. It runs something less than twenty minutes.

I have not been in touch with this area of practice in a long time. Twenty-five or thirty years ago, when I was engaged in representing people who either were involuntarily committed or being held for psychiatric reasons after having been arrested, the system was, at best, inadequate and, at worst, shameful. Perhaps Beth Breneman, whom I believe is currently at MAP would have more insight regarding current conditions and procedures. I recognize that Montana's conditions are not as dire as Dade County, but seeing those conditions reinstalled in me a sense of the injustice that our society does to the mentally ill.

In Dade County, the most seriously mentally ill criminal defendants that are being held pending trial are housed on the ninth floor of the jail. This is a jail that, I believe, was built some time post World War II. I would estimate the cells to be approximately 10' by 14'. Initially, the cells were designed to house two inmates with slab steel cots suspended by chain from the wall in a bunk-bed fashion. Currently, there is only one such bed in each cell. I will explain the reason below. Prisoners are kept routinely for weeks, and oftentimes for months, on the ninth floor. They are not allowed outside at any time. Currently, they are allowed out of their cells for fifteen minutes per day. This means that they are allowed into a common room on a staggered schedule. They are dressed in what were referred to as "Ferguson robes." These are quilted, long-sleeved almost full-length bathrobes. They have no buttons; I believe they close with Velcro. The prisoners wear no other clothing. They have

no mattresses. They have no bedding. They spend twenty-four hours a day in these robes. Because of overcrowding, there are almost routinely two people in a cell, and sometime that number climbs as high as five. Other than the single sleeping platform, the cell has only a tarnished steel toilet and sink that may or may not be functional at any given time. The conditions are horrible.

Because of his success with the misdemeanor diversion program, and for other reasons that I will discuss below, Judge Liefman has received some funding to radically alter the current conditions. Any significant change, however, is fully two years away. The program will be funded through an earmarked source derived from the sale of restaurant meals.

Judge Liefman's crusade has been helped in three critical ways:

First, Florida has a unique provision in its law that requires the Attorney General to empanel a Grand Jury every year. The nature of their proceedings has all of the secrecy provisions of our Grand Jury system, but the Grand Jury is allowed to investigate any issue that it deems appropriate. Several years ago, a Grand Jury decided to investigate the conditions to which Florida citizens were exposed when they were arrested and their cases were delayed due to a finding of mental illness. The Grand Jury findings were an indictment on a system that was unjust, antiquated, and inhumane.

Second, shortly after that Grand Jury report came out, a father of a mentally ill young man called the police and asked that his son be arrested. He did so out of frustration. He had been unable to obtain any meaningful mental health treatment for his son, and thought that he might be able to obtain such treatment if his son were arrested on a petty offense. His son was placed on the ninth floor of the Dade County Jail. At that time, the Dade County Jail had two bunks. He jumped off the top one, smashing his head onto the steel toilet. He is now a quadriplegic. His medical bills will cost Dade County a projected seven to ten million dollars over the course of his lifetime.

Third, at or about the same time, an investigative journalist for a Miami television station became interested in the story. I believe that her interest, in part, was sparked by Judge Liefman. She has now run ten segments on the local news. Each segment has been approximately ten minutes long, carefully documenting the terrible conditions in which Miami's mentally ill are housed (caged). In response to her stories, the newspapers have also become involved in Judge Liefman's crusade. In fact, there have been stories written by both Dave Berry and Carl Haisson.

It may very well be that the citizens of this state aren't treated as poorly as those in Florida, but if the conditions continue today in the fashion that I observed them twenty-five to thirty years ago, they remain unacceptable.

I will send copies of this memo and the DVD re: Dade County conditions to both Judge Larson and Missoula County Justice of the Peace Karen Orzech who both currently have a program to assist

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convicted defendants with identified mental health problems in coping with the criminal justice system.

As I said above, I recognize that this may not be a priority at this time, but some mechanism for diverting the mentally ill from the criminal justice system is certainly an appropriate goal for our commission and may very well be a method by which we can cut costs as well.

If you have any questions, please feel free to contact me

Mike

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February 21, 2007

Honorable John W. Larson
Missoula County Courthouse
200 W. Broadway Street
Missoula, Montana 59802

RE: *Mental Health Court Conference*

Dear Judge Larson:

On February 8, 2007, at your suggestion, I attended a presentation by the Honorable Steve Leifman, a Dade County judge who is currently the head of the Dade County Mental Health Program. Please find enclosed a copy of my letter to Judge Leifman.

The conference included a tour of the jail facilities that currently house the most seriously mentally ill defendants in Dade County. The conditions were appalling. I have enclosed a copy of a disc that I received from Judge Liefman when I attended the conference.

Please note that I have asked Judge Liefman to send any information he deems appropriate toward the Public Defender Commission's goals. Thank you for providing me the opportunity to attend the conference. If you would like to meet with me to discuss what I observed and learned, please feel free to have your staff contact my assistant, Marcia. Marcia will calendar whatever time you deem appropriate.

When I receive any additional materials from Judge Leifman I will forward them to you.

Sincerely yours,

MICHAEL J. SHERWOOD

MJS/kej

Encl.

Honorable Steve Liefman
Director, Dade County Mental Health Program

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February 21, 2007

Honorable Steve Liefman
Director, Dade County Mental Health Program
Richard E. Gerstein Justice Building
1351 Northwest 12th Street, Room 617
Miami, Florida 33125

Dear Judge Liefman:

First, thank you for being kind enough to extend an invitation to me, as a representative of the Montana Office of Public Defense, to attend the program that you presented on Thursday, February 8, 2007.

Second, to say the least, the information you provided was very valuable. The tour of the jail was compelling.

Third, to the extent that you have any information, especially regarding the cost-effectiveness of your current Misdemeanor Diversion Program, I would greatly appreciate it if you could provide it to me. My e-mail address is mike@mjsherwoodlaw.com. Electronic transfer would be more than sufficient. If you do not have the information electronically stored, please send me whatever information you think would be of value.

Fourth, I attended the program at the request of the Honorable John Larson, a Missoula County District Court Judge for the State of Montana. I will make arrangements to provide him whatever information you forward to me and to provide a copy of the disk that you have already provided to Judge Larson, as well.

Fifth, the Montana Public Defender's Office is assigned with the task of providing quality legal defense for all citizens who are provided legal representation at state expense. This currently includes involuntary commitment proceedings. Judge Larson, however, has spearheaded an

Honorable Steve Liefman
Director, Dade County Mental Health Program

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effort to establish a Mental Health Court, as well. The Office of Public Defense is currently involved in its first budget fight. Undoubtedly, those will recur every two, years when the Legislature meets. To the extent that we can provide information to the legislature indicating that diversion of defendants who have serious mental illnesses from the Justice System is not only more humane, but also cost-effective, we will do our best to do so.

Sixth, if you feel that I can in any way provide information to you that may be of any assistance or do anything else to return your favor in extending your invitation to me to attend the conference, please feel free to call upon me at any time.

Again, thank you for the invitation and the presentation. I wish you the best of luck in your truly humanitarian efforts.

Sincerely yours,

MICHAEL J. SHERWOOD

MJS/kej

cc: Judge Larson w/encl.